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Order 2002-10-3



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC**

Issued by the Department of Transportation
on the 2nd day of October, 2002

Served: October 2, 2002

2002 U.S.-MEXICO ALL-CARGO EXEMPTION SERVICE CASE
Docket OST-2002-13299

ORDER DENYING MOTION

Summary

By this order, we deny the motion of Express.Net Airlines, LLC (Express.Net) to dismiss the applications of Atlas Air Cargo, Inc. (Atlas) and Gemini Air Cargo, Inc. (Gemini), in the *2002 U.S.-Mexico All-Cargo Exemption Service Case* (Docket OST-2002-13299).

Motion

On September 24, 2002, Express.Net filed a motion to dismiss the applications of Atlas and Gemini in this proceeding, alleging that neither of the applicants provided the information specifically required by the Department's instituting order in this case.¹ Express.Net argues that, because Atlas failed to provide the required schedule and traffic forecast information in its supplement to its application, and Gemini failed to provide complete traffic forecast information in its initial application, Express.Net will not be able to address the information/data in Express.Net's direct exhibits. Express.Net argues, further, that the Department must dismiss the applications of Atlas and Gemini to ensure that carriers obey future procedural orders issued by the Department in route selection cases and to enforce the Department's own order and rules.^{2 3}

Responsive Pleadings

Atlas and Gemini each filed an answer to Express.Net's motion, and each urges the Department to deny it.⁴ Both carriers explain that they followed here the same approach of the applicants in the ongoing *U.S.-Brazil All-Cargo Service Proceeding* and elected to submit the required schedule and traffic forecast information in their Direct Exhibits. Atlas maintains that there will

¹ See instituting Order 2002-9-5, in Docket OST-2002-13299.

² Pursuant to the Department regulations, answers to the motion would normally be due no later than October 3, 2002. By Notice dated September 25, 2002, the Department shortened the date for answers to noon, September 27, 2002, with replies due no later than noon, September 30, 2002.

³ Both Atlas and Gemini have stated that they will provide the requested information at the Direct Exhibit stage of this proceeding. (See Supplement to Application of Atlas, at 2; and Application of Gemini, at 1.)

⁴ Gemini takes no position with respect to the Motion to Dismiss insofar as it seeks to dismiss the Atlas application in this proceeding.

be no delay in the proceeding and no “manifest unfair[ness]” to Express.Net. Similarly, Gemini maintains that Express.Net has not been prejudiced here. Both carriers argue that Express.Net will have ample opportunity to address the schedule and traffic information of the other applicants in its Rebuttal Exhibits and in its Brief. In its reply, Express.Net argues that neither Atlas nor Gemini has provided any justification for their failure to comply with the requirements of the Department’s instituting order in this case; that Express.Net would be prejudiced by their delays in submitting their proposals; and that their applications should be dismissed.

Decision

We have decided to deny the motion of Express.Net to dismiss the applications of Atlas and Gemini in this proceeding.

In their answers to Express.Net’s motion, Atlas and Gemini indicated that they would be providing with their direct exhibits the materials we stated applicants must provide to establish an adequate decisional record in this proceeding. Although Gemini has now indicated its intent not to proceed in the case, we fully expect Atlas to proceed as indicated.⁵ All the parties to this proceeding, including Express.Net, will have an opportunity to examine those materials and comment upon them, not only in rebuttal exhibits but also in subsequent procedural phases of this case.

Against this background, we see no prejudice to Express.Net, to any other party to this proceeding, or to the Department’s procedures, in the failure of Atlas and Gemini to include with their applications the specific information cited by Express.Net. Express.Net has not alleged specific prejudice that cannot be cured through use of the additional procedures in this case. We therefore shall deny Express.Net’s motion that those applications be dismissed.

ACCORDINGLY,

1. We deny the September 24, 2002, motion of Express.Net Airlines, LLC to dismiss the applications of Atlas Air Cargo, Inc., and Gemini Air Cargo, Inc., in the *2002 U.S.-Mexico All-Cargo Exemption Service Case*, Docket OST-2002-13299; and
2. We will serve this order on Express.Net Airlines, LLC; Atlas Air Cargo, Inc.; Gemini Air Cargo, Inc.; Capital Cargo International Airlines, Inc.; and Campbell-Hill Aviation Group; the National Air Carrier Association; and the Air Transport Association.

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

An electronic version of this order is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp

⁵ On September 30, 2002, Gemini moved to withdraw its application in this proceeding. We will address this motion separately. We do not view Gemini’s motion as affecting our determination on the merits of the Express.Net motion.